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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1605

FRED B. BLACK, JR.,

Petitioner,

v.

SHERATON CORPORATION OF AMERICA,
WASHINGTON SHERATON CORPORATION,
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Fred B. Black, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-captioned case on May 12, 1970.

CITATIONS TO DECISIONS BELOW

The judgment of the Court of Appeals is unreported and is printed in the Appendix at page 1. The opinion of the district court is reported at 47 F.R.D. 263 (1969) and is printed in the Appendix at page 2.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 12, 1970. (A. 1.) An order extending the time to petition for rehearing was entered on June 8, 1970. (A. 30) Rehearing was denied on January 21, 1971. (A. 43) The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF QUESTIONS PRESENTED

1. Are private parties who assist the Government in unlawful electronic eavesdropping immune from tort liability?

2. Was the court below correct in ruling that hotel officers and employees who assist the Government in unlawful electronic eavesdropping are informers, that the informer's privilege applies to such persons, and that the informer's privilege permits the Government to refuse to answer all questions about the part played by the hotel in the eavesdropping?

3. Did the court below afford the plaintiff due process of law in deciding plaintiff's motion to compel answers on the basis of Government evidence viewed *in camera*, which was not disclosed to the plaintiff?

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

The petitioner is suing the United States, the Sheraton Corporation of America, and the Washington Sheraton Corporation (hereinafter the Sheraton defendants) for invasion of privacy in the FBI's electronic eavesdropping upon his suite of rooms in the Sheraton Carlton Hotel in Washington, D. C. during 1963. In answer to the complaint, the United States admitted the eavesdropping but denied liability and denied the plaintiff had suffered any damages. The Sheraton defendants denied any knowledge or information concerning the eavesdropping.

At his deposition, Edward W. Pennypacker, the FBI agent in charge of the eavesdropping, refused to answer any questions about his contacts with the hotel personnel or the assistance he received from the hotel, claiming the informer's privilege (A. 24). The plaintiff moved to compel answers and asked that an evidentiary hearing be held on the claim of privilege. Instead the district court, Judge John J. Sirica, accepted the Government's request to examine extensive documents *in camera,* and ordered the submission of the documents (A. 25). The plaintiff then moved to modify the submission order to limit it to documents relating to the eavesdropping (A. 26). The court denied the motion to modify, examined the Government's documents *in camera,* and issued his opinion upholding the claim of privilege in all respects (A. 2).[1]

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[1] In his opinion the district court also denied plaintiff's motion for discovery of documents relating to the part played by the hotel, and the question of when the microphone was removed from the wall of plaintiff's suite. The court's ruling on the privilege question governs discovery of the documents relating to the hotel, so the discovery motion has not been treated separately on appeal. The question of the removal of the microphone has been resolved and is now moot A. 42).

The district court certified his ruling for immediate interlocutory appeal under 28 U.S.C. § 1292(b) (A. 28-29). The United States Court of Appeals for the District of Columbia Circuit granted plaintiff's petition for immediate appeal (A. 29) and the case was briefed and argued orally. The Court of Appeals then dismissed the appeal as inadvertently granted (A. 1), apparently on the basis of a question raised by the court at the oral argument as to whether the plaintiff had exhausted discovery of the hotel, a possible alternative source of the information sought.

The district judge, who had seen the Government's evidence *in camera,* had made no reference to any possibility of obtaining the information sought from the hotel or any other source outside the Government (A. 1-23). The district court decision also indicated that in the court's view the Sheraton defendants were immune from liability. (A. 16)

The time to petition for rehearing was extended pending discovery of the Sheraton corporations (A. 30) and in answers to interrogatories (A. 31) and a deposition (A. 42) these defendants denied any knowledge of the eavesdropping (A. 34). The plaintiff then petitioned for rehearing and the Court of Appeals denied rehearing without comment (A. 43). It is from the dismissal of the appeal and denial of rehearing that the plaintiff now seeks certiorari in this Court.

2. BACKGROUND

In May of 1966 the Solicitor General disclosed to this Court that the FBI had electronically eavesdropped upon the plaintiff's suite at the Sheraton Carlton Hotel in Washington, D. C. continuously during the months of February, March, and April, 1963, in violation of his Constitutional rights. The disclosure was made in two memoranda filed in the case of *Black v. United States,* October term, 1965, No. 1029, in which plaintiff sought review of his conviction for income tax evasion. In a footnote at page 4 of the sec-

ond memorandum, dated July 1966, the Solicitor General stated: "Recitation of these facts is not intended to suggest that any wrongdoing on the part of the petitioner was uncovered by the monitoring."[2]

In this civil action the plaintiff is suing for trespass, invasion of privacy, and violation of his Constitutional rights in connection with the eavesdropping. The claim against the United States is for compensatory damages under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. The claim against the hotel, based on the common law duties of the innkeeper to his guests, is for both compensatory and punitive damages.[3]

Since the denial of rehearing by the Court of Appeals, the plaintiff has served further interrogatories upon the Sheraton defendants. In answer to these, the Sheraton defendants have supplemented their denial of knowledge about the eavesdropping with a denial that any of their personnel assisted in the FBI investigation of the plaintiff, or furnished information about the plaintiff to the FBI. The plaintiff has also served further interrogatories upon the Government inquiring whether the former general manager of the hotel, who is now dead and thus presumably not subject to the informer's privilege, assisted in the eavesdropping. These interrogatories are presently pending.

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[2]In the memoranda, which are unreported, the Government admitted that conversations between plaintiff and his tax attorneys had been overheard on the microphone. The Court reversed plaintiff's conviction on the ground that he was deprived of a fair trial. *Black v. United States,* 385 U.S. 26 (1966). The case was remanded for a new trial, and at his second trial the plaintiff was acquitted of all charges against him by the jury. *United States v. Black,* Criminal cases Nos. 650-63, United States District Court for the District of Columbia, 1968.

[3]The plaintiff was a guest in the Sheraton Carlton Hotel continuously for ten years, approximately seven years before the eavesdropping and three after. (A. 12)

Discovery of the Sheraton defendants has shown that of approximately 250 employees at the time of the eavesdropping, only some 50 remain in the employ of the hotel. Apart from four former employees who have been questioned, it is only with respect to these present employees that the Sheraton defendants have answered plaintiff's interrogatories.

In summary, the hotel corporations have now repeatedly denied any knowledge of or involvement in the eavesdropping. The Government, on the other hand, has admitted that it received assistance from certain "confidential informants," but has refused to answer the question whether these persons were officers or employees of the hotel. The district court has upheld the Government's refusal to answer any questions about the part played by the hotel in the eavesdropping, and the Court of Appeals, after granting an interlocutory appeal, has dismissed the appeal as inadvertently granted.

There are no national security considerations involved in this case, nor has the Government disputed the plaintiff's assertion that there is no danger of physical harm to anyone involved in the case if his identity is disclosed.

Discovery on other aspects of the case has proceeded while this question has been on appeal. The Government has taken a large number of depositions on the question of the extent of plaintiff's damages, and apparently intends to take more. However, it is anticipated that the case against the Government will be ready for trial late in this calendar year.

REASONS FOR GRANTING THE WRIT

The ruling below raises fundamental questions of law and public policy concerning civil remedies for unlawful electronic eavesdropping by Government agencies.

1. By a Governmental claim of privilege, is a person to be denied a civil remedy against a third party, such as a hotel corporation, which assists the Government in an unlawful invasion of his privacy? The district court, in the context of a discovery ruling, has apparently created an immunity from civil liability for private parties who assist law enforcement officers in unlawful electronic eavesdropping. (A. 16 fn. 11.)

2. Technically, the court has ruled that the informer's privilege applies to the hotel personnel involved in the eavesdropping, and permits the Government to refuse to answer all questions about the part played by the hotel. Whether the informer's privilege applies to persons involved in electronic eavesdropping is a matter of first impression in the courts. The decision below is contrary to the accepted interpretation of the informer's privilege as stated by this Court in *Roviaro v. United States,* 353 U.S. 53 (1957), and to a decision by the Supreme Court of the State of New Jersey that persons involved in wiretapping are not informers. *Morss v. Forbes,* 24 N.J.341,132 A.2d 1, 13 (1957). In addition, the scope of the privilege granted the Government here goes far beyond the informer's privilege, which in the past has applied only to the identity of the informer.

3. Is not a claim for punitive damages appropriate in a case such as this where the hotel has apparently wilfully injured the plaintiff by not merely failing to protect his privacy, but actively assisting in the unlawful invasion of privacy, and where compensatory damages may be difficult to prove? The district court has decided that the plaintiff does not need a claim against the hotel, because he has stated an "apparent" cause of action against the Government under which he "may" obtain compensatory damages, (A. 14) and his claim for punitive damages constitutes only a minimal interest in the informer's identity (A. 15).

4. Is a Government claim of the informer's privilege in a case of unlawful electronic eavesdropping to be resolved

entirely *in camera*, although there are no national security considerations involved in the case, and it is admitted that there is no physical danger to any alleged informer who may be involved? Does not the *in camera* reception of Government evidence on a question at issue in the case deny the private citizen due process of law, under *Greene v. McElroy*, 360 U.S. 474 (1959) and other cases.

5. Is the Government entitled to a privilege in a court of law where its conduct is lawless and deliberately in violation of the Constitution? Does not the imperative of judicial integrity, *Elkins v. United States*, 364 U.S. 206, 222 (1960), forbid the granting of a privilege under such circumstances?

The decision by the district court raises all these questions, and the district judge has certified his decision for interlocutory appeal. By its grant of the appeal the Court of Appeals acknowledged that the decision presents substantial questions of law. That court's effort to avoid these questions if possible by requiring the plaintiff to exhaust all alternatives is understandable, but the court's final backing away from the case is inexplicable. If these questions are not resolved by an interlocutory appeal, and the district court's ruling is reversed after the trial of the case against the Government, there will have to be a second trial of the same case against the hotel. This is clearly an instance where interlocutory appeal under 28 U.S.C. § 1292 (b) is appropriate.

Persons Who Assist Law Enforcement Officers in Unlawful Electronic Eavesdropping Are Not Informers

In *Roviaro v. United States*, 353 U.S. 53,59 (1957), this Court defined the informer's privilege as follows:

> "What is usually referred to as the informer's privilege is in reality the Government's privilege to with-

> hold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. (Citations omitted.) The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."

Persons who assist law enforcement officers in unlawful electronic eavesdropping are not informers because they do not themselves furnish information of violations of law. Any information obtained is obtained from the microphone, the "bug", not from persons who assist in some way, such as permitting the eavesdropping, or aiding in the installation of the microphone, or keeping its presence a secret from the person being eavesdropped upon.

Persons involved in electronic eavesdropping are not the source of any information obtained, they do not "furnish information" or "communicate their knowledge" to law enforcement officers. They merely make it possible for the law enforcement officers to eavesdrop on the private conversations of others.

This was the analysis of the Supreme Court of New Jersey in *Morss v. Forbes,* 24 N.J. 341, 132 A.2d 1, 13 (1957) on the essentially undistinguishable question whether persons involved in wiretapping are informers. There the court said:

> "The Committee submits, however, that the court below committed error in classifying wiretappers in the same category as informers, and there seems to be merit in this view. Those who tap wires are mere accessories to the disposition, control and regulation of the mechanical contrivances employed to accomplish that object. Their function is to record telephone conversations in a permanent form and to transmit the substance, so memorialized, to their

> employers. The person operating the tap acquires information of wrongdoing only as an incident to the pursuit of his primary function. If information of criminal conduct is secured in the form of an admission or evidence of participation, it comes from the mouth of the person whose telephone is tapped and not from the functionary who presides over the mechanical working of the recording process. He is not the originator or source of the information imparted to the agency of the law, he merely complies with instructions received from the police authority. Of course, a wiretapper may also be an informer under certain circumstances, but that is not the factual development here encountered. Those persons who supervised and actually tapped wires for the prosecutor do not come within the classification or category of 'informer'. The common law privilege has no applicability to persons who undertake to tap wires in accordance with their employment." (132 A.2d at 13.)

This is a sound analysis and it should be applied to eavesdropping by microphone, also.

In his opinion the district court, after quoting the *Roviaro* definition, expands the meaning of the term "informer," and the privilege, from "persons who furnish information of violations of law" to all who "cooperate with or assist a law enforcement agency" (A. 4). This is a major change in the law, with ramifications far beyond this case. The court justifies this change by stating that "the actual scope of the factual situations in which the privilege has been invoked, however is significantly broader" [than the *Roviaro* definition]. (A. 3)

There is no support in the cases cited, or in any other cases which the parties could find, for the district court's expanded interpretation of the informer's privilege. In keeping with the general disfavor of the law for evidentiary privileges, see 8 Wigmore, Evidence (McNaughton rev. 1961) § 2192(3), the term "informer" in the context of the

informer's privilege has uniformly been construed narrowly by the courts, as dictated by *Roviaro.* In no prior reported case has it been held that any activity other than furnishing information of violations of law constituted informing.

Three of the cases cited by the district court in support of its broad reading of the term "informer," *Roviaro, supra, Gilmore v. United States,* 256 F.2d 565 (5 Cir. 1958), and *United States v. Conforti,* 200 F.2d 365 (7 Cir. 1952), involve the use by law enforcement officers of what are variously referred to as "special employees," *Gilmore, supra,* "confidential sources," *Conforti, supra,* and the like, euphemisms for persons paid for furnishing information of violations of law. The cases cited, and many others like them, arise when the law enforcement officers use the "special employees" not only as sources of information of crime but also as decoys to enable the law enforcement officers to witness the actual commission of a crime—such as the sale of narcotics, *Roviaro, Gilmore,* or counterfeit money, *Conforti,* or to capture the seller of illegal goods in the act.

In these cases it is either assumed or the Government declares that the "special employee" was an informer, i.e., he provided information as to the violation of law. The question at issue is whether, in his further role as a decoy, the informer played a sufficiently important part in the actual commission of the crime to make him a necessary witness at a trial—in spite of the fact that he was an informer and as such presumably entitled to the informer's privilege.

Thus, in *Roviaro,* the Court stated that the problem raised by the case was:

> "the Government's right to withhold the identity of an informer who helped to set up the commission of the crime and who was present at its occurrence." 353 U.S. at 61.

It is a distortion of the obvious meaning of *Roviaro* to infer that the person is to be considered an informer *because* he helped to set up the commission of the crime

and was present at its occurrence. As the Court clearly indicated in the passage from *Roviaro* quoted at the beginning of this discussion, this person was an informer because he furnished information of violations of law.

Gilmore, supra, and *Conforti, supra,* the other decoy cased cited by the district court, make it clear that it is furnishing information of violations of law, and that alone, which makes a person an informer. In each of these cases the court expressly indicates that by acting as a decoy or engaging in other activities to assist the law enforcement officers, the person in question was not acting as an informer.

In denying the informer's privilege in *Gilmore, supra,* the Fifth Circuit said:

> "Here Anonymous had done more than merely inform or supply information. He was an active participant in setting the stage, in creating the atmosphere of confidence beforehand and in continuing it by his close presence during the moments of critical conversation." 256 F.2d at 567.

In denying the informer's privilege in *Conforti, supra,* the Seventh Circuit said:

> "the Government insists, and correctly so, that communications made by informers to the Government are privileged. But the unidentified person, No. 54, involved in this case was more than a mere informer. He was not simply an individual who, knowing that the defendant had committed or was about to commit a crime, communicated that knowledge to the authorities so that the police, acting independently, might then procure evidence of the crime. On the contrary, No. 54 played a part with the defendant in the very transactions upon which the Government relies to prove its case." 200 F.2d at 367.

Thus in the very cases cited by the district court for the proposition that activities other than furnishing information of violations of law have been held to constitute informing, the courts themselves have ruled that these other activities

were *not* part of informing. The decoy cases directly contradict the suggestion that there has been a broadening of the meaning of the term "informer" to the point where anyone who cooperates with or assists a law enforcement agency in any way is considered by the courts to be an informer.

The facts of *Wilson v. United States,* 59 F.2d 390 (3 Cir. 1932), and *Howard v. Allgood,* 272 F.Supp. 381 (E.D. La. 1967), do not support the district court's interpretation of those cases, either. The detailed statement of facts at the beginning of the dissenting opinion in *Wilson* shows that the informer in that case had indeed furnished information of a violation of law. 59 F.2d at 392.

In *Howard v. Allgood, supra,* as the district court indicates, the person who was claimed to be an informer knew nothing of the crimes that had been committed and had no knowledge of the reason for the investigation, i.e., he did not furnish information of any violation of law. At the trial, the state court judge ruled the person was not an informer and ordered the policeman who refused to name him jailed for contempt. On the defendant's petition for habeas corpus, the federal court agreed the man was not an informer and that the policeman should have named him, but held that the refusal to do so was not prejudicial because the man knew nothing about the case and his name would have done the defense no good anyway. 272 F.Supp. at 385. Nothing in *Howard v. Allgood* suggests that anyone other than a person who furnishes information of violations of law is an informer within the informer's privilege. Indeed, the case properly stands for the proposition that one who assists law enforcement officers in some way other than by furnishing information of violations of law is *not* an informer within the informer's privilege.

In short, the cases cited by the district court simply do not support a broad interpretation of the term "informer." There is no basis in law for the district court's ruling that

the persons connected with the hotel who were involved in the electronic eavesdropping on plaintiff's suite were informers.

Moreover, there is no basis in public policy for expanding the informer's privilege to include persons involved in electronic eavesdropping by Government agents. Indeed, it is difficult to imagine a case in which an expansion of established governmental privilege would be more inappropriate than this case, where high Government officials authorized a deliberate violation of the Constitutional rights of a citizen. Far from expanding an existing privilege, the imperative of judicial integrity, *Elkins v. United States,* 364 U.S. 206, 222 (1960), would seem to require the courts to deny the Government any privilege under such circumstances. It has often been held that it is contrary to the public interest to grant the Government privileges where the Government's conduct is wrongful. *Singer Sewing Machine Co. v. N.L.R.B.,* 329 F.2d 200, 208 (4 Cir., 1964); *Bank of Dearborn v. Saxon,* 244 F.Supp. 394, 402 (E. D. Mich. 1965); *Rosee v. Board of Trade,* 36 F.R.D. 684, 689 (N.D. Ill., 1965); *United States v. Proctor & Gamble Co.,* 25 F.R.D. 485, 489 (D.N.J., 1960).

A Private Party who Assists the Government in Unlawful Electronic Eavesdropping Should Not Be Immune From Civil Liability

Having found the hotel personnel to be informers, it became necessary under *Roviaro* for the court to weigh the factors in the case favoring disclosure against the factors favoring nondisclosure (A. 5-6). Since the relevance and materiality of this information to plaintiff's case against the hotel are apparent, the court undertakes to discount the need for that *case*, and minimizes plaintiff's claim for punitive damages. The court apparently avoids the argument that the question of punitive damages is for the jury to decide on the basis of the facts, and even a directed verdict by the court must be based on the facts in the record, by indicating that the Shera-

ton defendants, even if in the wrong, *are immune from liability.* (A. 16) Analytically, this footnote comment is essential to the court's decision.

The district court's prospective concern that the public may be deterred from cooperating with law enforcement officers if the hotel is held liable here is misplaced. It is elementary that liability is to depend upon the facts of the particular case, not broad public policy considerations which may or may not apply. Surely such considerations going to liability cannot be used to prevent disclosure of the facts of the case.

Moreover, it is only cooperation with lawful law enforcement efforts which is in the public interest, and this Court has established that in the future, to be lawful, electronic eavesdropping of this type must have prior judicial authorization. *Katz v. United States,* 389 U.S. 347 (1967). If law enforcement officers obtain a warrant authorizing such electronic eavesdropping, the warrant will presumably constitute an authorization for private parties to cooperate, and will immunize such parties from civil liability for the invasion of privacy. On the other hand, if the law enforcement officers do not obtain a warrant, their electronic eavesdropping will be unlawful, and it will not be in the public interest for private parties to cooperate with them. Under such circumstances the threat of civil liability may deter private parties from cooperating, and thus may have a deterrent effect on unlawful eavesdropping by law enforcement agencies, at least where the assistance of outside parties is necessary or desirable.

There is simply no need to expand the established and narrowly drawn informer's privilege in order to assure public cooperation with legitimate law enforcement activity in the area of electronic eavesdropping. On the other hand, to make assistance to all eavesdropping, lawful and unlawful, a subject of privilege, may substantially nullify the requirement of a warrant for such activities, for it will eli-

minate a very practical reason for law enforcement officers to obtain a warrant—the need to obtain the cooperation of private parties.

Finally, it needs to be said that there is something outrageously wrong about the very notion that a private party could take part in *tortious and unlawful* activity, even with law enforcement officers, and be immune from civil liability to the injured person. Surely there is no justification for such a departure from the rule of law in this case.

The district court's argument that persons will be deterred from cooperating with law enforcement officers by the need to decide for themselves in advance whether the activity is lawful is contrived and meaningless. The only activity at issue in this case is electronic eavesdropping by microphone, and the legality of that is determined by whether a warrant is obtained. There is no need for speculation by the so-called informer as to whether the law enforcement activity is legal or not.

The court's effort to categorize the civil cases in which disclosure has been ordered by punitive and waiver "types" is artificial. The decision is not based on the "type" of case but the fact situation. Courts have gone both ways in exactly the same type of case because of different fact situations presented. See *Mitchell v. Bass,* 252 F.2d 513 (8 Cir., 1958) (disclosure required); *Mitchell v. Roma,* 265 F.2d 633 (3 Cir., 1959) (disclosure not required). Moreover, this is clearly a punitive type case, and the Government should be deemed to have waived any privilege it might have had when it deliberately violated the plaintiff's Constitutional rights.

The persons connected with the hotel who were involved in the electronic eavesdropping on plaintiff's suite were not informers as that term has been used heretofore, and there is no reason for the courts to change the meaning of the word informer, and the privilege, to include such persons now. The decision of the district court, which does that, should be reversed.

The Plaintiff Was Denied Due Process Of Law By The District Court's in camera Reception of Evidence

It is established that even where the informer's privilege does apply, only the identity of the informer is privileged, *Roviaro v. United States,* 353 U.S. 53, 60 (1957) *Westinghouse Elec. Corp. v. City of Burlington, Vermont,* 122 U.S. App. D.C. 65, 351 F.2d 762 (1965). The question whether the privilege applies is to depend upon a balancing of the competing factors favoring disclosure and nondisclosure, and

> "Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case . . ." *Roviaro,* 353 U.S. at 62.

The question of privilege depends upon the relevance and materiality of the informer's identity to the issues in the case, *Roviaro,* 353 U.S. at 60-61, and the possible significance of the informer's testimony, 353 U.S. at 62.

Accordingly, the plaintiff requested an evidentiary showing by the Government of the particular circumstances of the case.[4] The Government, however, refused to make any showing whatsoever of the facts of the case. The reason is apparent. The Government is not merely attempting to shield an "informer" from disclosure, it is attempting to shield the Sheraton defendants from liability. What other explanation can there be for the Government's refusal to answer even the question whether its agents contacted anyone connected with the hotel, or received assistance from the hotel, or how many persons connected with the hotel

[4] At the oral argument in the district court the plaintiff listed ten questions which could be answered without disclosing the identity of anyone, most requiring merely a yes or no answer. These questions included such matters as whether the Government had received assistance from the hotel in the eavesdropping, whether the persons involved were living, whether they were present employees of the hotel, what role they played in the eavesdropping, if they provided information, what information, and if they provided assistance, what assistance. Plaintiff urged that these matters should be resolved before the question of identify, and thus privilege, was reached.

were involved? Answers to these questions will not disclose the identity of any alleged informer, but they may well establish the liability of the hotel corporations to the plaintiff.

Rather than make an evidentiary showing on the record, the Government asked the court to examine its evidence *in camera*, and the court agreed to do so. The district court did not merely examine these documents, however, he received them in evidence, for his decision is based on the substance of these documents. In his opinion the court states:

> "Rather than to limit the class to whom the privilege is generally applicable, the better approach is *to weigh the nature of the informer's role* in determining whether disclosure is appropriate under the standards established by the *Roviaro* decision . . . . Applying the above *to the facts of this case*, it is my view that the person or persons who assisted the Government in the eavesdropping of plaintiff's suite were informers within the accepted legal meaning of that word." (Emphasis added.) (A. 4-5.)

What was the nature of the informer's role? What are the facts of the case? Due process of law would seem to mean that a party has a right to know what the evidence is which results in a decision against him. Surely the plaintiff has a right to know what these persons did that makes them informers and entitles the Government to refuse to identify them. It cannot be that the Government can cut off all inquiry into this matter simply by stating that these persons were informers.

Due process of law also means that a party has a right to cross-examine witnesses. The persons who prepared the documents which the district court received in evidence *in camera* were testifying through those documents and the plaintiff has a right to cross-examine these persons. In *Greene v. McElroy*, 360 U.S. 474 (1959), this Court was faced with a situation where a matter was resolved adversely to a party partly on the basis of documents from FBI files,

including evidence obtained from unidentified informants. This evidence had not been made available to the opposing party because it allegedly might lead to the identity of confidential informants. The Court ruled that all the evidence on which the decision was based must be disclosed to the opposing party. 360 U.S. at 496.

Cross-examination is a matter of right, not a mere privilege, in civil as well as criminal cases. *Greene v. McElroy, supra, Alford v. United States,* 282 U.S. 687 (1931); *The Ottawa,* 3 Wall (U.S.) 268, 271 (1866); *DuBeau v. Smither and Mayton, Inc.,* 92 U.S. App.D.C. 213, 203 F.2d 395, 396 (1953). In *Reilly v. Pinkus,* 338 U.S. 269, 276 (1949) cited in *Greene,* this Court ruled that depriving a party of his right to cross-examination is not cured by having the fact finder examine the documents at issue, because among the purposes of cross-examination are eliciting testimony from the witness about the document and testing the accuracy and veracity of the witness' testimony.

There is also a discussion by Judge Learned Hand in *United States v. Coplon,* 105 F.2d 628, 639-640 (2 Cir., 1950) of the use to which a court can put information obtained by an *in camera* examination of Government documents. In short, Judge Hand says such information cannot be used as the basis for a ruling by the court against the other party on an evidentiary question. That is precisely what the district court has done here.

By deciding the question whether the informer's privilege is applicable on the basis of information contained in Government documents viewed *in camera,* the district court denied the plaintiff due process of law. There are no national security considerations involved in this case and there is no threat of physical harm to anyone involved. Thus there is simply no justification for such proceedings.

CONCLUSION

WHEREFORE, the premises considered, Petitioner prays that this Petition for a Writ of Certiorari be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, McGOWAN and WILKEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

This court permitted this appeal after certification by the District Court under 28 U.S.C. § 1292(b) (1964). After consideration, it appears that this permission was improvidently granted. It is, therefore,

ORDERED and ADJUDGED by this court that this appeal be, and it is hereby, dismissed.

Per Curiam.

Filed May 12, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRED B. BLACK, JR., *Plaintiff,*	:	
v.	:	Civil Action No. 440-67
SHERATON CORPORATION OF AMERICA, et al., *Defendants.*	:	

OPINION

The subject matter of this litigation is the electronic surveillance by the United States of a suite of rooms in the Sheraton Carlton Hotel in Washington, D. C. Plaintiff is suing the United States, Sheraton Corporation of America, and the Washington Sheraton Corporation for trespass and invasion of privacy which allegedly resulted from the eavesdropping on conversations in the suite.

Plaintiff served a notice of deposition[1] and commenced taking the deposition of certain agents of the United States. During the course of his deposition, Edward Pennypacker, an agent of the Federal Bureau of Investigation, refused to answer certain questions on the ground that they would tend to disclose the identity of a confidential informer or informers of the United States. The questions posed by the plaintiff were whether the FBI contacted anyone at the Sheraton Carlton Hotel in connection with its alleged unlawful surveillance of plaintiff's suite therein and, if so, who that person was.

Plaintiff has moved this Court to compel an answer to the above questions pursuant to Rule 37(a) of the Federal Rules of Civil Procedure.

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[1] Fed. R. Civ. P. 26(a).

Plaintiff has also moved the Court under Rule 34 of the Federal Rules of Civil Procedure to order the United States to produce for inspection and copying by the plaintiff certain documents alleged to be relevant to plaintiff's cause of action.

Defendant United States has moved for a protective order pursuant to the provisions of Rule 30(b) limiting the scope of the deposition of Edward Pennypacker and any other agent of the Federal Bureau of Investigation during the course of this action. Defendant United States also moves under Rules 34 and 30(b) for an order limiting the scope of the areas concerning which records must be produced in this action.

This Court has held an extensive hearing on these matters and has considered memoranda in support of and in opposition to each of the motions. The Court also conducted an *in camera* inspection of certain documents presented to it by the United States concerning the role of the informers in the surveillance. *See Westinghouse Elec. Corp. v. City of Burlington,* 122 U.S. App. D.C. 65, 73, 351 F.2d 762, 770 (1965).

I will discuss seriatim each of the motions before the Court.

I. MOTION TO COMPEL AN ANSWER TO QUESTIONS

The threshold question in deciding whether or not the government should be compelled to disclose the identity of an informer, concerns the definition of an informer. *Roviaro v. United States,* 353 U.S. 53 (1957), the leading case in the informer privilege area presented the following definition of the privilege: ". . . [T]he Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." 353 U.S. at 59.

The actual scope of factual situations in which the privilege has been invoked, however, is significantly broader. It

has been held to apply not only to persons who supply information to the authorities but also to those who cooperate with or assist a law enforcement agency. In *Roviaro*, for instance, the informer was the transferee of the narcotics. He was the sole participant in the transaction other than the accused. Yet there was no question about his status as an informer.

In *Howard v. Allgood*, 272 F. Supp. 381 (E.D. La. 1967), the informer knew nothing of the crimes that had been committed and had no knowledge of the reason for the investigation. His sole role in the affair was to let the police know whether or not the petitioner was at home before they attempted to confront him. The Court held that while the informer was not an "informer" insofar as the crime or any element thereof was concerned, it was not error for the government to refuse to disclose his identity. The district judge thus recognized the principle that citizens who assist the police on a confidential basis should remain anonymous.

In *Wilson v. United States*, 59 F.2d 390 (3d Cir. 1932), a citizen furnished a Prohibition Act officer with a key to premises which contained illegal liquor. Although holding that disclosure was proper since the identity of the informer was necessary to determine the defendant's guilt or innocence, the court naturally classified the person who helped the officer as an informer. The informer's privilege concept, therefore, must be viewed from a broader perspective to include more than mere "information-givers." Courts have consistently, though often tacitly done this in the past. *See Gilmore v. United States*, 256 F.2d 565 (5th Cir. 1958); *United States v. Conforti*, 200 F.2d 365 (7th Cir. 1953).

Rather than to limit the class to whom the privilege is generally applicable, the better approach is to weigh the nature of the informer's role in determining whether disclosure is appropriate under the standards established by the *Roviaro* decision. The public interest extends beyond merely encouraging members of the public to convey information

to the authorities and includes rendering whatever assistance is necessary to achieve effective law enforcement. This duty goes back to more primitive days in our history when citizens were required to participate in the establishment of a *posse comitatus*. *See In re Quarles*, 158 U.S. 532, 535-536 (1894).

Applying the above to the facts of this case, it is my view that the person or persons who assisted the government in the eavesdropping of plaintiff's suite were informers within the accepted legal meaning of that word.

Having established that they were informers, it is incumbent upon the Court to determine whether their identity should remain undisclosed.

There can be no disputing the fact that the aid and assistance of citizens and corporations are necessary for the effective administration of justice.[2] It is the primary purpose of the informer's privilege to facilitate this private cooperation in law enforcement by encouraging informers to provide pertinent information to the government without fear of public disclosure, retaliation or social disfavor.

Originally, the informer's privilege was a broadly conceived evidentiary rule insulating persons who assisted the

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[2]In an affidavit filed herein, Attorney General John N. Mitchell commented that "confidential informants are the single most important source of information in the field of law enforcement. . . . In my judgment the damage to the public interest which would result from a disclosure of the identity of confidential informants far outweighs the plaintiff's individual interest in this action. . . ." Affidavit of John N. Mitchell, Black v. Sheraton Corporation, C.A. No. 440-67 (D.D.C., filed Feb. 20, 1969) p. 2.

Cartha D. DeLoach, Assistant to the Director of the Federal Bureau of Investigation stated that confidential informers to the FBI were responsible for locating 5,864 subjects in 1967 and during the 1965-1967 period indirectly resulted in the recovery of $33,000,000 in stolen merchandise. The locating of a subject led to his arrest in all but a very small percentage of the cases. Affidavit of Cartha D. DeLoach, Black v. Sheraton Corporation, C.A. No. 440-67 (D.D.C., filed Feb. 20, 1969) pp. 3, 4.

authorities from disclosure. *See In re Quarles,* 158 U.S. 532 (1894); *Vogel v. Gruaz,* 110 U.S. 311 (1884). It assumed a quasi-absolute breadth until 1957 when the Supreme Court ruled in *Roviaro v. United States,* 353 U.S. 53

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense.

Id. at 62.

In a subsequent case the United States Court of Appeals for the District of Columbia construed *Roviaro* as introducing a fairness concept, making more flexible what was once a mechanical rule. *Westinghouse Elec. Corp. v. City of Burlington,* 122 U.S. App. D.C. 351 F.2d 762 (1965), *on remand,* 246 F. Supp. 839 (D.D.C. 1965). *Westinghouse* also held the *Roviaro* restructuring of the informer's privilege to be applicable in civil cases. *Id.* at 72-73, 351 F.2d at 76[illegible] 770.

This formulation of the informer's privilege, however, has not been applied without difficulty.

> The testimonial privileges and incompetencies of the common law have seen a continuing shrinkage. Not that the courts are callous to the protection of informers. . . . However, the informer's shadow over litigation often forces courts to make hard judgments in reconciling basic and conflicting social values.

Mannefrid v. Teegarden, 23 F.R.D. 173, 177 (S.D.N.Y. 1959). A majority of the cases considering the disclosure problem since *Roviaro* have involved criminal defendants. *See, e.g., McCray v. Illinois,* 386 U.S. 300 (1967); *Rugendorf v. United States,* 376 U.S. (1964); *Toohey v. United States,* 404 F.2d 907 (9th Cir. 1968); *Hurst v. United States,* 344 F.2d 327 (9th Cir. 1965). The informer's often crucial role in the facts at issue in criminal cases and the serious question of defendant's guilt or innocence operate strongly to prompt disclosure of the informer. But even in this area,

where defendant's argument for disclosure is strongest, the courts have been reluctant to create broad disclosure rules. In *McCray v. Illinois,* 386 U.S. 300 (1967), defendant sought to create a constitutional right to discovery of the informer's identity. His argument that the due process clause of the Fourteenth Amendment and the Sixth Amendment applicable to the states through the Fourteenth Amendment demanded disclosure in state criminal trials was dismissed by a majority of the Justices. The Court was of the view that even in cases where the informer's testimony relates to the ultimate question of the defendant's guilt, there is no absolute rule of disclosure, 386 U.S. at 311.[3] Rather, the Court must balance the public interest in protecting the flow of confidential information to the government against the individual's right to prepare his defense, 386 U.S. at 310, *citing* 353 U.S. at 62. The Supreme Court's reluctance in the most critical of situations has been accompanied by an even greater hesitation to order widespread disclosure "where the issue is [illegible] preliminary one of probable cause, and guilt or innocence is not at stake." 386 U.S. at 311. The recently published tentative draft of the American Bar Association Project on Minimum Standards for Criminal Justice relating to Discovery and Procedure Before Trial recognizes the role of informers in effective law enforcement with the result that "only the most compelling circumstances should require pretrial disclosure of the informer's identity by the prosecution, such as constitutional requirements or the fact that the identity is going to be disclosed anyway when he becomes a witness at a trial or hearing . . . ."[4]

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[3] In *Roviaro* the informer was central to circumstances surrounding the illegal act in that he might well have established the defense of entrapment. "He might have thrown doubt upon . . . [defendant's] identity or on the identity of the package." 353 U.S. at 64.

[4] American Bar Association Minimum Standards for Criminal Justice relating to Discovery and Procedure Before Trial (1969), § 2.6, P. 92. See also Preliminary Draft of Proposed Rules of Evidence for the United States District Courts & Magistrates, Rule 5-10, 46 F.R.D. 161, 276 (1969).

In the criminal area, the *Roviaro* doctrine, while broadening the discovery of informers, has been applied with great caution.

The Supreme Court's decision in *Roviaro,* although directed toward procedures in a criminal prosecution, has been cited as authority in civil cases. In *Westinghouse Elec. Corp. v. City of Burlington,* 122 U.S. App. D.C. 65, 351 F.2d 762 (1965), the United States Court of Appeals for the District of Columbia unequivocally affirmed its applicability in civil cases. The Court held that "there is no logical reason to set up two different privileges, one for civil and one for criminal cases." *Id.* at 72, 351 F.2d at 769. "The *Roviaro* balance should be struck in each case, civil and criminal, in deciding whether disclosure 'is essential to a fair determination of a cause.' " *Id., quoting* 353 U.S. at 61. *See, Mitchell v. Bass,* 252 F.2d 513 (8th Cir. 1958); *Mannefrid v. Teegarden,* 23 F.R.D. 173 (S.D.N.Y. 1959).

Although *Roviaro* has been said to be generally applicable to civil suits, disclosure has been ordered in two types of cases: (1) in punitive civil suits; (2) in cases where the informer or the government has waived the privilege. Punitive civil actions are suits brought by private citizens or by the government under authority of a statute to punish noncompliance or to compensate those who suffered injury because of defendant's failure to abide by the statute's terms. Two of the more common civil punitive actions are those brought under the anti-trust laws, 15 U.S.C. § 15 (1964), or the Fair Labor Standards Act, 29 U.S.C. § 216 (1964). The statutes authorizing these punitive actions make the private plaintiffs, prosecutors or private attorneys general. The judgment is punitive as well as compensatory and is designed to create a deterrent effect as well as compensate the injured party.

The decision of the United States District Court for the Northern District of Illinois in *United States v. Swift & Co.,* 24 F.R.D. 280 (1959), illustrates the post-*Roviaro* approach in punitive civil suits. *Swift & Co.* sought to modify a con-

sent judgment entered against them in a prior anti-trust proceeding. In furtherance of this motion they moved for discovery of certain questionnaires concerning market conditions in the possession of the respondent United States. Rejecting respondent's claim of informer's privilege, the Court held that *Roviaro* not only abolished any claim of absolute privilege, *quoting* 353 U.S. at p. 62, but also established a balancing of interests to determine whether disclosure should be ordered, *quoting Id.* The Court finding that the requested information did not involve an unlawful act and was not the kind to excite resentment, ordered disclosure.

In *Boeing Airplane Co. v. Coggeshall,* 108 U.S. App. D.C. 106, 280 F.2d 654 (1960), Boeing requested certain documents in possession of the United States Renegotiation Board for use in a Tax Court proceeding to determine whether Boeing had made excess profits on a government contract. 50 U.S.C. App. § 1218 (1964). The Court of Appeals rejected the Renegotiation Board's defense on the ground of informer's privilege, and held that Boeing should have access to the Board's factual and investigatory reports. The Court found *inter alia* that disclosure would not seriously impair the Renegotiation Board's sources of information, and to the extent it did it was insignificant compared to the importance of this information to the Tax Court . . . ." 108 U.S. App. D.C. at 113, 280 F.2d at 661. *See Mitchell v. Bass,* 252 F.2d 513 (8th Cir. 1962).

A case which illustrates both the "punitive action" and "waiver" exceptions to informer's privilege is *City of Burlington v. Westinghouse Elec. Corp.,* 122 U.S. App. D.C. 65, 351 F.2d 762 (1965). In Westinghouse more than 1800 treble damage actions had been brought in the federal courts against several manufacturers of electrical equipment, of which Westinghouse was one. In defense of these suits, Westinghouse sought to prove by discovery that the plaintiffs knew of the illegal acts more than four years before they brought suit. The reason for this requested discovery

was that such knowledge, if there was any, might help establish a defense to the claims of plaintiff-appellees that they should recover damages for transactions beyond the four-year period of limitations because the defendants had fraudulently concealed the alleged conspiracy and thereby tolled the running of the statute of limitations. 15 U.S.C. § 15b.[5]

In an attempt to establish this defense the defendants requested every letter, memorandum, or other written communication, and all notes, memoranda or other records of each oral communication, during the period between January 1, 1948, and December 31, 1960, which were made or which are under the control of the Department of Justice, in which any distributor of electricity, group of distributors or engineering consultant or firm thereof, or any officer, agent, or employee of the same, complained, alleged, suggested, or otherwise asserted that there may have been price fixing or other violations of the anti-trust laws in the electrical equipment industry. The Attorney General moved to quash the subpoena duces tecum on several grounds, one of which was that the documents were protected from disclosure by the informer's privilege. The District Court granted the government's motion to quash the subpoena on the informer's privilege and oppressiveness grounds. Defendants appealed and the Court of Appeals reversed the District Court's order and remanded the case to the District Court for application of the *Roviaro* doctrine to civil cases.[6] On

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[5]For a more comprehensive review of the electrical equipment cases, see Report of the Co-Ordinating Committee for Multiple Litigation of the United States District Courts, a subcommittee of the Committee on Pretrial Procedure and Practice of the Judicial Conference of the United States (Sept. 1, 1965); Neal and Goldberg, The Electrical Equipment Anti-trust Cases: Novel Judicial Administration, 50 A.B.A.J. 621 (1964).

[6]The Court of Appeals sought to include the Westinghouse facts within both recognized exceptions to the informer's privilege. The Court found that "a treble-damage action is not wholly a private civil action. The statute permitting such actions is designed to make private parties prosecutors. The judgment is punitive as well as compen-

remand the District Court allowed a limited discovery. The District Court held that "the Department of Justice must turn over to the defendants copies of, or allow the defendants to inspect, examine, and make copies of all letters, memoranda and other written communications . . . which are covered by the subpoena and which relate to complaints by persons, corporations, etc. which are, or were at any time, plaintiffs in the electrical equipment cases." 246 F. Supp. at 846. The District Court construed the Court of Appeals' decision to provide that once a complainant has filed suit, he has revealed his identity, and subjected himself to civil discovery, and that the government should not be permitted to withhold information which the plaintiffs themselves would have had to disclose. *Id.*

The waiver theory has other manifestations than the initiation of a suit. In *Clark v. Pearson*, 238 F. Supp. 495 (D.D.C. 1965), plaintiff sued defendant for libel for an article defendant wrote charging plaintiff with graft. In the article defendant stated that he had turned certain incriminating documents over to the Department of Justice. When plaintiff sought to recover the documents the Justice Department resisted on the ground of informer's privilege. The Court ordered that the documents be turned over on the theory that by turning the documents over and then writing in his column about them he waived any right to the privilege.

In *Mannefrid v. Teegarden*, 23 F.R.D. 173 (S.D.N.Y. 1959), the plaintiffs admitted writing certain letters after noting an objection that the question of the letters were within the scope of the informer's privilege. The Court held that the letters must be turned over since by admitting authorship the plaintiffs had waived the protection of the privilege.

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satory." 122 U.S. App. D.C. at 73, 351 F.2d at 770. The Court also held that "plaintiffs in this case should be regarded as having waived the informer's privilege as to their communications with the Government . . . ." *Id.*

The waiver cases are reconcilable with the teachings of *Roviaro*. The latter decision created a balancing of interests test in attempting to achieve fairness in administering the privilege. Once a party admits he was an informer he no longer has any interest in anonymity. Likewise when he files suit his interest in remaining anonymous as to matters relevant to the suit disappears. It would be a breach of fairness to allow him to sue another and at the same time erect a legalistic facade of anonymity.

In criminal cases, it is necessarily the defendant, his freedom and reputation in jeopardy, who seeks discovery of an informer who may well have evidence beneficial to the defense. In the punitive civil cases the party who seeks disclosure is similarly in a defensive position defending charges brought by either the government or an individual representing the public interest.

The waiver cases represent a related but converse situation. In those cases it is not so much that the party who seeks disclosure has equities in his favor justifying the identification of the informer but rather that the informer for some reason has moved without the protection of the privilege.

The matter before the Court in these motions falls within none of the aforementioned categories. It is a civil case, but the party who seeks disclosure is the plaintiff and he seeks to obtain a judgment for compensatory and punitive damages against the defendants. There is no allegation that the informers have waived their privilege; the question in its most basic form is: does fairness derived by balancing the respective interests require anonymity or disclosure.

Plaintiff maintained a suite of rooms at the hotel for ten years preceding May 1966. On May 24, 1966, defendant United States disclosed in a memorandum to the United States Supreme Court that agents of the defendant installed a spike mike listening device in the wall of plaintiff's suite

and monitored conversations in defendant's room from February 7, 1963, to April 25, 1963.[7]

On February 24, 1967, plaintiff commenced the present action against the United States and the two hotel companies based upon the monitoring of his hotel rooms. Plaintiff contends that the hotel corporations participated in and acquiesced in the tortious trespass and invasion of privacy by the United States and are thereby liable to the plaintiff for compensatory and punitive damages. The plaintiff seeks to determine the identity of any informers who aided the United States in the alleged illegal eavesdropping. He contends that the identity of the informer or informers, their relationship to the hotel, and the role they played are integral to the cause of action against the hotel corporations.

Plaintiff's justification for obtaining the disclosure of the informer's identity is that plaintiff's constitutional rights have been violated by the defendant and disclosure is a prerequisite to the vindication of those rights. Plaintiff contends that "the fact that plaintiff's privacy was invaded pursuant to a policy of the government to violate the Constitution requires that the informer's privilege be denied the government here.[8] Plaintiff thus presents a two fold argument in favor of disclosure: (1) It is necessary for the presentation of his case; (2) The government is not entitled to invoke the privilege. It is helpful in an analysis of this problem to focus on these two reasons in greater detail.

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[7]Plaintiff was indicted in 1963 and convicted on May 5, 1964, after a jury trial of attempting to evade his 1956, 1957 and 1958 income taxes (U.S.D.C. Cr. Nos. 650-63 and 651-63). The conviction was affirmed on appeal, Black v. United States, 353 F.2d 885 (D.C. Cir. 1965) and the Supreme Court denied a petition for certiorari, 384 U.S. 927 (1966). Following disclosures by the Solicitor General, the Supreme Court remanded the case for a new trial, Black v. United States, 385 U.S. 26 (1966). Plaintiff was found not guilty on retrial July 17, 1968.

[8]Plaintiff's reply to opposition of the United States to motion to compel answers, Black v. Sheraton Corp., C.A. No. 440-67 (D.D.C. 1967) p. 25

The plaintiff claims that if he is denied the identity of the informer, he would be prejudiced in his attempt to vindicate his constitutional rights. Plaintiff is suing both the United States and the two corporate defendants for damages arising out of the eavesdropping. He is suing the United States for compensatory damages under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*[9] The existence of nonexistence of an informer is not important with respect to this cause of action. The government has admitted the fact of the surveillance. Plaintiff has no interest in and consequently in fairness, could not demand that the government disclose the name of its informers.[10] Plaintiff's basic affirmative interest then, in obtaining disclosure is in furtherance of his suit against the two private corporations which allegedly participated in this alleged tortious and illegal act. Plaintiff's suit against the hotels may well be facilitated by disclosure of the informer's identity. The extent of his interest in the informer's identity, however, is not so readily apparent since to determine that the Court must examine plaintiff's purpose in suing the hotel corporations. As noted earlier plaintiff has stated an apparent cause of action irrespective of disclosure against the United States under the Federal Tort Claims Act. He may be compensated for any provable damages arising from the eavesdropping. He therefore has no interest in a compensatory action against the hotel since any recovery against the latter would be duplicative to the recovery against the United States. His prime interest therefore in perfecting an action

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[9]The suit against the United States is limited to compensatory damages since punitive damages are not recoverable against the United States, 28 U.S.C. § 2674.

[10]In its reply to the government's opposition to plaintiff's motion to compel answers, plaintiff, whenever he refers to the necessity for disclosure, always phrases the need in terms of his case against the corporate defendants. *See, e.g.*, plaintiff's reply, Black v. Sheraton Corp., C.A. No. 440-67 (filed Mar. 24, 1969, D.D.C.), pp. 2, 3, 19, 23.

against the hotel corporations is to secure a punitive judgment against them for their alleged roles in the surveillance. This is the sole affirmative interest which the plaintiff seeks to foster by disclosure of the informer's identity.

"[Punitive damages] . . . are allowed and awarded as a punishment to the defendant and as a warning and example to deter him and others from committing like offenses in the future. Under this theory such damages are allowed on grounds of public policy and in the interest of society and for the public benefit, not as compensatory damages, but rather in addition to such damages." 22 Am. Jur.2d § 237 (1965) (footnotes omitted); *see Washington Gaslight Co. v. Lansden,* 172 U.S. 534 (1899); *Scott v. Donald,* 165 U.S. 58 (1897). Punitive damages are allowable where a tort is aggravated by evil motive, actual malice, deliberate violence or oppression. *Id.* Plaintiff's interest in discovering the identity of the informers is to strengthen his case for punitive damages against the defendant hotel. The substantiality of this interest is questionable, especially in light of the ends customarily sought to be achieved by exemplary damages. Plaintiff has alleged an apparent cause of action against the United States for its alleged tortious conduct. Recovery and the consequent publicity may well have a deterrent effect against such tortious conduct if proven. Plaintiff, however, also seeks to discourage private individuals from joining with the government in tortious conduct. Plaintiff must recognize, however, that he is thus placing the burden on a potential informer to determine whether his assistance is tortious. If his role is determined at some future time to be tortious this potential informer must recognize that he would be liable for compensatory and punitive damages. Thus, in reality, the plaintiff desires the identity of the informer so that he may obtain a punitive judgment against the hotel and generally discourage assistance to the government by informers. Plaintiff believes that he would discourage only tortious assistance but in effect the necessity for the informer to prejudge his assistance would generally discourage cooperation.

Plaintiff has, then, what is best termed a minimal interest in discovering the identity of the informer.[11]

Plaintiff approached the *Roviaro* balancing alternatively. We have discussed his interest in discovery, and found it to be minimal. He also proposes that the government has no interest in protecting the identity of the informer.

The informer's privilege does not run to the benefit of the individual but rather is the government's privilege to protect the sources of its information and the individuals who assist it. It stems from a recognition that citizens will not come forward to assist the government if they believe

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[11] Plaintiff has contended that he was the subject of an alleged tortious act perpetrated by the informer and his employees, and is therefore entitled to compensation for the resulting injuries. In the analogous area of governmental immunity, a cause of action is not granted to every plaintiff alleging that he was the victim of a tort perpetrated by an employee of the United States. A strong governmental interest may override plaintiff's interest in compensation. In Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950), Judge Learned Hand commented on governmental privilege, as follows:

> Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Id. at 581.

Likewise in *Blitz v. Boog* the Court held that a state psychiatrist was immune from suit for false imprisonment arising from a report that the plaintiff was insane. Blitz v. Boog, 328 F.2d 596 (2d Cir. 1964); *See* Taylor v. Glotfelty, 201 F.2d 51 (6th Cir. 1952).

In this case where the strong governmental interest with respect to informers is directly involved, the words of Judge Hand have persuasive significance.

their involvement might well become public, with the consequent danger of reprisals and resentment. Plaintiff's argument that there is no danger of retaliation in an individual case does not obviate the necessity for the privilege since it is the disclosure itself rather than the conditions which prompted it that inhibit citizen cooperation. In *Westinghouse* the Court of Appeals stated, "the privilege exists for the benefit of the general public, not for the benefit of the particular informer involved." Therefore, to the extent that a potential informer believes that his anonymity depends upon someone else's finding that disclosure would be dangerous to the informer he will necessarily be reluctant to give assistance.

The focus in *Roviaro* is on the plaintiff's variable need vis-a-vis the government's more or less constant need to preserve the anonymity and maintain the cooperation of its informers.

This is not a criminal case nor is it a punitive civil action against the petitioner in this motion. Federal courts have consistently indicated that the privilege is stronger in civil cases. *See Bocchicchio v. Curtis Publishing Co.*, 202 F. Supp. 403, 407 (E.D. Pa. 1962); *In re Gurnsey's Petition*, 223 F. Supp. 359 (D.D.C. 1963). It is especially so in this case since the plaintiff has an alleged cause of action which does not depend on the informer's disclosure.

II. MOTION FOR DISCOVERY OF DOCUMENTS

Plaintiff's second motion before the Court is for discovery and production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure. The United States has voluntarily consented to turn over a portion of the requested documents[12] dealing with the fruits of the surveillance. An

[12]The United States has voluntarily consented to turn over upon court order the following documents (1) the logs of the microphone surveillance (2) any portion of an airtel containing information from the surveillance (3) portions of reports containing information from the surveillance.

order requiring this limited discovery was filed on May 14, 1969.

The contested portion of the motion involves requests for information about the planning, execution and termination of the surveillance.[13]

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[13]Plaintiff's motion for discovery requests in part:

> 2. All communications, reports, memoranda, notes, records, record entries, writings and documents of any sort:
>
> (a) containing or relating to any and all requests for permission for, or approval of, the installation of the microphone involved in this surveillance.
>
> (b) containing or relating to any and all authorizations or grants of approval for the installation of said microphone.
>
> (c) concerning or relating to preparations for the installation of said microphone and the conducting of said surveillance, including but not limited to any arrangements with hotel personnel, renting of the rooms involved, obtaining the floor plan of plaintiff's rooms, and obtaining the necessary equipment and instruments.
>
> (d) concerning or relating to the installation of said microphone and the conducting of said surveillance.
>
> (e) concerning or relating to the transfer of the listening station from rooms 436-434 to room 432, and any and all preparations therefor.
>
> (f) concerning or relating to the termination of the surveillance of plaintiff's suite.
>
> (g) concerning or relating to the wiring between rooms 436-434 and room 432 and the apparatus connected therewith, including but not limited to all references to the leaving in place or removal thereof.
>
> (h) concerning or relating to the microphone installed in the wall of plaintiff's suite and the apparatus connected therewith, including but not limited to references to the leaving in place or the removal thereof.
>
> (i) authorizing, relating to, or reflecting the payment of funds for the rental of rooms 436-434 and/or room 432 at the Sheraton-Carlton Hotel in connection with the microphone surveillance of plaintiff's suite.
>
> (j) authorizing, relating to, or reflecting the payment of any funds to or on behalf of or for the benefit or or in connection with the use of any confidential contact at

Rule 34 in essence provides that upon motion of a party showing good cause, another party may be ordered to produce for inspection and copying any nonprivileged documents or tangible objects in his possession which constitute or contain evidence relating to any of the matters within the scope of discovery established by Rule 26(b). The basic prerequisite to discovery which the moving party, the plaintiff in this case, must satisfy[14] is that there be good cause for the production of the items he seeks. "Good cause" is ordinarily satisfied by a factual allegation showing that the requested documents are necessary to the establishment of the movant's claim or that denial of production would cause the moving party "hardship or injustice." 4 J. Moore, Federal Practice, par. 34.08 at 2478 (2ed 1968). See *Hickman v. Taylor,* 329 U.S. 495 (1947); *Boeing Airplane Co. v. Coggeshall,* 108 U.S. App. D.C. 106, 280 F.2d 654 (1960); *Groover, Christie & Merritt v. LoBianco,* 119 U.S. App. D.C. 50, 336 F.2d 969 (1964). The movant also has the obligation to establish the materiality and relevance of the documents which production he seeks.[15] Good cause, however, implies a greater show-

> the Sheraton-Carlton Hotel in connection with the microphone surveillance of plaintiff's suite.
>
> (k) requesting, authorizing or instructing the Washington Field Office of the FBI to undertake an investigation into the activities of the plaintiff, or on the basis of which such investigation was undertaken.
>
> (l) concerning or relating to any confidential inside contact at the Sheraton-Carlton Hotel utilized in any way in connection with the microphone surveillance of plaintiff's suite.

[14]That the burden of satisfying the prerequisites to discovery is on the moving party has been well established in this Circuit. See Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 280 F.2d 654 (1960); Von Der Heydt v. Rogers, 102 U.S. App. D.C. 114, 251 F.2d 17 (1958).

[15]Hartford Nat'l Bank & Trust Co. v. E. F. Drew & Co., 13 F.R.D. 127 (D. Del. 1952); William A. Meier Glass Co. v. Anchor Hocking Glass Corp., 11 F.R.D. 487 (W.D. Pa. 1951); Marzo v. Moore-McCormack Lines, 7 F.R.D. 378 (E.D.N.Y. 1945).

ing of need than relevance and materiality. If this were not so the "good cause" requirement which appears in only Rules 34 and 35 would be meaningless. *Schlagenhauf v. Holder,* 379 U.S. 104, 118 (1964). It is the opinion of this Court that vis-a-vis the United States, the plaintiff has not establish sufficient good cause to order disclosure.

This is a relatively unique case. The plaintiff has alleged that agents of the United States in the course of their employment did wrongfully trespass upon the plaintiff's suite at the Sheraton Carlton Hotel and did wrongfully invade the privacy and constitutional rights of the plaintiff by eavesdropping on conversations in his suite and thereby violated the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671 *et seq.*

In answer thereto the United States

> admits that the electronic surveillance which is the subject of this action was disclosed in the Supreme Court in June 1966, and that the plaintiff was not at any time prior thereto informed by this defendant that the electronic surveillance had occurred.

Answer of United States, *Black v. Sheraton Corporation,* C.A. No. 440-67, (D.D.C. Sept. 23, 1968) p. 2 (hereinafter cited as "Answer").

The defendant also admitted in its answer that the eavesdropping was authorized and that the employees of the United States conducting the investigation acted within the scope of their employment. Answer, p. 3.[16] In subsequent

[16]In its answer the United States has admitted that under a Department of Justice practice in effect during the period of 1963 to 1965, the Director of the Federal Bureau of Investigation was given authority to approve the installation of devices such as the spike mike in question, for intelligence purposes when required in the interest of internal security or national safety. The defendant has admitted that acting on the basis of Departmental authorization, the Director approved the installation in the instant case. The defendant further admits that employees within the scope of their employment conducted the surveillance of plaintiff's suite by placing a listening device in a common wall between plaintiff's suite and an adjoining room which penetrated one quarter of an inch into plaintiff's side of the common wall. Answer, p. 3.

deposition hearings the United States described in detail how the eavesdropping was accomplished.[17]

In light of this admission of the pertinent facts at issue the plaintiff has not alleged sufficient need to justify his discovery relative to his suit against the United States. He has not made a sufficient showing as to why he needs the additional information in light of the facts disclosed by defendant United States.

The United States has submitted to the Court copies of papers on file with the United States District Court for the Southern District of Florida (Miami Division) in the case of *Roberta Feiner v. United States,* No. 67-611-Civ-CA (S.D. Fla., filed June 12, 1969). The facts of that case as alleged in the papers of the parties are similar to the present case. The United States eavesdropped on conversations in plaintiff's home; voluntarily disclosed the eavesdropping, and was sued by the plaintiff for trespass. Plaintiff sought to discover by deposition information concerning details of the installation and maintenance of the bug. The questions plaintiff asked in *Feiner* were markedly similar in subject matter to the documents plaintiff seeks to discover in this action, and the United States had made admissions similar to those in this case. Judge Clyde Atkins denied plaintiff's

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[17] Special Agent Philip M. King of the Federal Bureau of Investigation was deposed by the plaintiff on January 3, 1969. He was one of the agents assigned to the Black surveillance. Agent King testified at length about the planning which led to the installation of the eavesdropping device, its installation into the common wall, and the details of its operation. See deposition of Philip M. King, Black v. Sheraton Corp., C.A. No. 440-67, (D.D.C., filed Jan. 3, 1969), pp. 6-13 (planning; 15-20 (installation); 20-31 (operation).

Special Agent Edward Pennypacker of the Federal Bureau of Investigation was likewise deposed by the plaintiff and gave information concerning the authorization, planning, maintenance and termination of the eavesdropping. See deposition of Edward Pennypacker, Black v. Sheraton Corp., C.A. No. 440-67, (D.D.C., filed Jan. 3, 1969), pp. 26-27, 30, 35, 36 (authorization for surveillance); 27, 30 (planning); 38, 43, 44, 48, 49, 60 (monitoring procedures); 50 (termination).

motion for discovery. The United States had presented two grounds in opposition to the motion. The first and primary one was that in light of the defendant's admissions, the questions were irrelevant. The other ground was national security privilege. While the actual order is unclear as to which ground the Court relied on, the government alleged in a covering letter, filed herein, that irrelevancy was Judge Atkins' ground for his decision.

While *Feiner* is factually distinguishable from the present case, it is authority for the proposition that the government's rather detailed admission of the facts of the eavesdropping can render further factual discovery irrelevant and without good cause.

Plaintiff contends, however, that this discovery, with special emphasis on sections 2(j) & (1) of the motion,[18] is crucial to his cause of action against the corporate defendants. In his affidavit filed herein March 24, 1969, in support of his motion, plaintiff's attorney says, "In particular it is believed that there are or may be documents relating to the existence, identity, and/or activities of an employee or employees or other person or persons connected with the Sheraton Carlton Hotel or the Sheraton defendants who were involved in the eavesdropping on plaintiff's suite." Affidavit of Gerald S. Rourke, *Black v. Sheraton Corp.*, C.A. No. 440-67, (D.D.C., filed Mar. 24, 1969) pp. 1, 2.

Rule 34 of the Federal Rules of Civil Procedure limits discovery to those documents which are not privileged. The question, then, as it was in the previous motion, is, whether the documents plaintiff seeks to discover are privileged. For the same reasons this Court gave in response to the motion to compel answers, the identity of the alleged informers is protected by the informer's privilege. Therefore, any documents which would tend to disclose his identity are also privileged.

What are the documents for which the plaintiff has need against the corporate defendants? Obviously, they do not

[18] *See* note 13, *supra*.

need the documents alleging the facts of the alleged tort since the government has admitted the facts. Rather, they seek documents which might somehow connect the informer to the corporate defendants. Since these documents would certainly tend to identify the informer, this Court holds that they are not discoverable. Hence, in neither its suit against the United States nor the corporate defendants has the plaintiff satisfied the prerequisites to discovery of the documents requested by its motion.

III. MOTION FOR A PROTECTIVE ORDER

Defendant has moved this Court to issue a protective order under Rule 30(b) limiting the scope of the plaintiff's deposition of defendant's employees, and plaintiff's request for disclosure of documents in the possession of the defendant United States. This Court is of the view that its orders in the two preceding motions will effectively limit plaintiff's discovery to matters relevant, nonprivileged and necessary, and that a formal protective order at this time would be premature and unnecessary.

Counsel will submit an appropriate order.

John J. Sirica

July 24, 1969

EXCERPTS FROM DEPOSITION OF EDWARD W. PENNYPACKER

Q. Was this communication in writing?

A. Yes, it was.

Q. To your knowledge, was it the result of a lead obtained from FBI—from the use of an eavesdropping device by the FBI in Las Vegas?

A. I can't answer that question at this time. I am under instruction of the Attorney General not to disclose any information which might tend to identify an FBI informant or confidential informant.

Q. And the answer to this question would involve that, I mean, in your opinion?

A. Yes, in my opinion, if I were to answer the question it would involve that.

Q. Now, with respect to your instructions, do you understand this to refer to eavesdropping devices, do you include them as informants, or are you talking about individual persons?

A. With regard to this answer I am referring to individual persons.

* * * * *

Q. Did you have any contacts with people employed by the Sheraton or in the hotel?

A. I have to decline to answer that question on the previous statement that I made that the Attorney General has instructed me not to answer any questions which would tend to identify confidential informants.

Q. I didn't ask you in this question for the identity of the informant. I asked you if you had such a contact.

MR. PETERSON: You have your answer, counsel. The witness stands on it.

MR. ROURKE: Well, I would just like to clarify—

MR. PETERSON: We have admitted in our answer that the FBI received information from confidential informants. You are not going to ascertain from this witness or from any other witness prior to getting an order to that effect from a court of law as to who the informants were or where they were located in any particular organization, whether they were private citizens, whatever kind of identity they had.

MR. ROURKE: Do I understand that to mean you will not answer any questions with respect to an informer or an inside contact in the hotel, Mr. Peterson?

MR. PETERSON: That is correct, counsel.

ORDER

The Court having before it for consideration at the present time various motions of the plaintiff and the United States which all deal essentially with the question of the existence, identity and activities of a confidential informant of the Federal Bureau of Investigation whom plaintiff alleges was an employee of the two Sheraton defendants in this action, and the United States having offered to submit to the Court for in camera inspection those documents from the files of the Federal Bureau of Investigation which pertain to the identity of the confidential informant and detail the assistance or information which the confidential informant provided to the Federal Bureau of Investigation,

IT IS HEREBY ORDERED that the United States produce to the Court for in camera inspection the following documents from the files of the Federal Bureau of Investigation pertinent to an investigation of Fred B. Black, Jr.:

1. All documents which identify the confidential informant;
2. All documents which contain, detail, state, or summarize any information or assistance which the confidential informant furnished the Federal Bureau of Investigation;
3. All documents which pertain to any contact, meeting or communication between the confidential informant and any member or employee of the Federal Bureau of Investigation; and

IT IS HEREBY FURTHER ORDERED that the United States shall submit to the Court a cover document itemizing and identifying all documents submitted to the Court pursuant to this Order.

The documents themselves which are produced to the Court for an in camera inspection pursuant to this Order are to be returned to the United States prior to the entry of any order or decision on the merits of the claim of the informer's privilege by the United States. The itemized list identifying the said documents will be retained by the Court under seal pending any review of the matter, and upon conclusion of any final review will also be returned to the United States.

John J. Sirica
UNITED STATES DISTRICT JUDGE

June 6, 1969

MOTION TO MODIFY ORDER

Comes now the plaintiff Fred B. Black, Jr., by his attorneys, and hereby moves the Court to modify its order entered in the above captioned proceeding on June 6, 1969.

The changes in the order which plaintiff requests the Court to make are as follows:

"1. Change the last paragraph of the order to provide that any and all documents submitted to the Court in camera be sealed and retained by the Court pending review. The order presently provides that only a list of such documents will be retained by the Court.

2. Change paragraph No. 1 to provide for the submission of one document which identifies the alleged informer. The order presently provides for the submission of all documents which identify the alleged informer.

3. Change paragraph No. 2 to limit the documents being submitted to those which pertain to activities of the alleged informer in connection with the eavesdropping on plaintiff's suite at the Sheraton Carlton Hotel. Paragraph No. 2 presently provides for submission of all documents pertaining to *any* information or assistance furnished by the alleged informer.

4. Change paragraph No. 3 to provide for the submission of all documents which pertain to any contact, meeting or communication concerning or in connection with the eavesdropping on plaintiff's suite at the Sheraton Carlton Hotel between the alleged informer and any agent of defendant United States. Paragraph No. 3 presently provides for the submission of all documents which pertain to any contact, meeting or communication between the alleged informer and any member or employee of the Federal Bureau of Investigation.

5. Add to the order a provision for an evidentiary hearing prior to any in camera examination of documents.

The filing of this motion does not constitute a waiver or withdrawal of plaintiff's objection to in camera proceedings in this case.

Respectfully submitted,

/s/ Edward P. Morgan

/s/ Gerald S. Rourke

Attorneys for Plaintiff

June 19, 1969

ORDER

Plaintiff's Motion to Modify Order having come on for hearing before this Court on June 27, 1969, and the Court having considered the said Motion, Plaintiff's Memorandum of Points and Authorities in Support of the Motion, the Response of the United States, and the oral argument presented by counsel for plaintiff and the United States,

IT IS ORDERED that the plaintiff's Motion to Modify Order be and the same is hereby denied.

Dated this 30th day of June, 1969.

/s/ John J. Sirica
UNITED STATES DISTRICT JUDGE

ORDER

The plaintiff herein having moved this Court pursuant to Rule 37(a) of the Federal Rules of Civil Procedure for an order to compel answer by agents of the United States to questions pertaining to the identity of persons allegedly connected with and/or employed by the Sheraton Corporation of America and/or the Washington Sheraton Corporation who are alleged to have assisted in the electronic surveillance which is the basis of this action, the plaintiff having moved this Court pursuant to Rule 34 of the Federal Rules of Civil Procedure for an order requiring the United States to produce from its files certain documents pertinent to the aforesaid electronic surveillance, the United States having moved this Court pursuant to Rules 30(b) and 34 of the Federal Rules of Civil Procedure for a protective order limiting the scope of discovery by plaintiff by deposition and motion for production, the Court having considered the said motions of the parties, all papers filed in support of and in opposition to them, and the oral argument of counsel for the parties in reference to the motions, and the Court having filed an Opinion in the matter on July 25, 1969.

IT IS HEREBY ORDERED THAT:

1. The motion of plaintiff to compel answer to questions be and the same is hereby denied;

2. The motion of plaintiff to compel production of documents be and the same is hereby denied; and

3. The motion of the United States for a protective order limiting the scope of discovery be and the same is hereby denied as unnecessary at this time in light of the denial by this Court of the motions of plaintiff.

In making its determination as set forth above, the Court is of the opinion, pursuant to 28 U.S.C. 1292(b), that this Order involves controlling questions of law as to which there is substantial ground for difference of opinion and

that an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

Dated this 11th day of August, 1969.

/s/ John J. Sirica
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORDER

On consideration of petitioner's petition for the allowance of an immediate appeal under 28 U.S.C. § 1292 (b) of respondents' opposition and petitioner's reply with respect thereto, it is

ORDERED by the Court that petitioner's aforesaid petition for allowance of interlocutory appeal under 28 U.S.C. § 1292(b) is granted.

Counsel are urged to docket the record on appeal and to file their briefs on appeal as soon as possible and the Clerk is directed to schedule the appeal for argument on the merits as promptly after the briefs are filed as the business of the Court will permit.

Per Curiam

Filed September 22, 1969

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORDER

On consideration of appellant's motion to extend the time to petition for rehearing, or for rehearing, it is

ORDERED by the Court that the time for the filing of a petition for rehearing is extended for a period of 10 days from the date on which the District Court rules on a pend-

ing motion to suppress interrogatories, in the event said Court grants the motion. If the District Court denies the motion to suppress, the time for the petitioning for rehearing is extended for a period of 10 days from the date on which the answers to the interrogatories are received by counsel for appellant.

Counsel for appellant shall advise this Court promptly if the District Court grants the government's request to suppress or, alternatively, counsel for appellant shall advise this Court when he receives the answers to the interrogatories.

Per Curiam

Filed June 8, 1970

December 22, 1970

The Honorable Nathan J. Paulson,
Clerk
United States Court of Appeals
for the District of Columbia
Constitution Avenue and John Marshall Place
Washington, D. C. 20001

Re: No. 23,542
Fred B. Black, Jr. v.
Sheraton Corporation of
America, et al.

Dear Mr. Paulson:

In accordance with the Order of the Court in the above-referenced case filed on June 8, 1970, this is to advise the Court that on December 21, 1970, the undersigned counsel for appellant received the answers of the Sheraton defendants to the interrogatories served heretofore.

In their answers, the Sheraton defendants deny knowledge of the eavesdropping upon appellant's suite. Accordingly, appellant shall file a petition for rehearing as permitted by the order of June 8, 1970.

Yours very truly,

Gerald S. Rourke

PLAINTIFF'S INTERROGATORIES TO DEFENDANTS SHERATON CORPORATION OF AMERICA AND WASHINGTON SHERATON CORPORATION

The plaintiff hereby propounds and serves the following written interrogatories upon defendants Sheraton Corporation of America and Washington Sheraton Corporation (collectively, "the Sheraton defendants") to be answered under oath within fifteen days from the date of service hereof:

1. Did any agent or employee or anyone connected in any way with either of the Sheraton defendants have knowledge of, or authorize, or assist in any way in electronic eavesdropping upon the suite of the plaintiff in the Sheraton Carlton Hotel during February, March, and April, 1963?

2. If the answer to interrogatory 1 is in the affirmative, with respect to each and every such person, state:

a) His or her name and position or connection with either of the Sheraton defendants in 1963.

b) His or her present position or connection, if any, with either of the Sheraton defendants or last known employer and address.

c) If said person had knowledge of said electronic eavesdropping, when, where, and how or from whom such knowledge was obtained.

d) If said person authorized said electronic eavesdropping, when, where, and to whom this authorization was given.

e) If said person assisted in any way in said electronic eavesdropping, the manner in which such person assisted, and when, where, and to whom such assistance was rendered.

3. If the answer to interrogatory 1 is in the negative, state with respect to each and every person contacted or questioned concerning the subject matter of interrogatory 1:

a) Said person's name and position (with either Sheraton defendant or otherwise) in 1963;

b) Said person's position or connection, if any, with either Sheraton defendant at present or his last known employment and home address.

c) The date or dates on which said person was questioned or contacted concerning this matter.

d) The person or persons who questioned or contacted said person concerning this matter.

e) The questions said person was asked concerning this matter.

f) The answers said person gave concerning this matter.

g) Whether any notes, memoranda, or writings were made of such questions and answers or any discussion with such person, and if so, where and in whose custody or control such writings are at present.*

h) Whether any statements, letters, memoranda, or other documents written or signed by such person have been obtained by said defendants or their attorneys, and if so, where and in whose custody or control such documents are at present.*

4. If the answer to interrogatory 1 is in the negative, state for the period from January to May 1, 1963, the name and position of each person employed by the Shera-

*If defendants will voluntarily produce a copy of any such documents, this subparagraph may be answered by attaching such copy to the response to the Interrogatories.

ton Corporation of America in Washington, D. C. and each person employed by the Washington Sheraton Corporation at or in connection with the Sheraton Carlton Hotel, and the present or last known employer and address of each such person.

5. If the answer to interrogatory 1 is in the negative, on what date did any agent or employee of either Sheraton defendant first learn of the electronic eavesdropping on plaintiff's suite, what was the name and position of said agent or employee, and how did said agent of employee learn of the eavesdropping?

6. Was a physical inspection of plaintiff's suite and the adjoining suite conducted to determine whether any electronic eavesdropping had occurred? If so, state:

(a) The date of each and every such inspection.

(b) The name of each person who conducted or participated in any such inspection.

(c) Whether a report, memorandum, or other writing concerning any such inspection or inspections was prepared, and if so, where and in whose custody or control such reports are at present.*

7. When did plaintiff first rent a room or rooms in the Sheraton Carlton Hotel?

8. During what periods since that time has plaintiff rented a room or rooms in the Sheraton Carlton Hotel?

9. What monthly rental was plaintiff charged during each year in which he was a registered occupant of rooms at the Sheraton Carlton Hotel?

10. What was the total rent paid by plaintiff during each of such years?

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*If defendants will voluntarily produce a copy of any such documents, this subparagraph may be answered by attaching such copy to the response to the interrogatories.

11. What was the total of all charges paid by the plaintiff to the Sheraton Carlton Hotel in 1963? in 1964? in 1965? in 1966?

/s/ Edward P. Morgan

/s/ Gerald S. Rourke
WELCH & MORGAN
Attorneys for Plaintiff

May 8, 1970

ANSWERS TO PLAINTIFF'S INTERROGATORIES ONE THROUGH FIVE

1. No.

2. Not applicable.

3. (a)(b) See Exhibit I attached hereto.

(c) Virtually all persons were questioned the week of December 18, 1970, and some were questioned at various other times without regard to answering these interrogatories.

(d) Peter R. Sherman and Armin U. Kuder, counsel for the hotel; Mr. Leif R. Evensen.

(e) See Exhibit II attached hereto.

(f) See answer to interrogatory number one.

(g) All memoranda containing the questions asked and the answers given are in the possession, custody and control of counsel of record at the present time.

(h) Counsel of record have in their possession, custody and control documents written or signed by Charles A. Prior, Laura Acock and Helen Warfel.

4. The answer to this interrogatory involves several hundred employees and personal data which may be obtained from business records, abstracts therefrom or summaries thereof which will be made available for plaintiff's inspection at a mutually agreed upon time. See F.R.C.P. 33(c).

5. No agent or employee questioned knew of the electronic eavesdropping on plaintiff's suite by the FBI prior to the public disclosure of same in the various news media in May, 1966.

/s/
Henry de Rooze
General Manager, Sheraton-Carlton Hotel, and Agent of Sheraton Corporation of America and the Washington Sheraton Corporation for Purposes of Answering these Interrogatories.

SMOLLAR, KUDER, SHERMAN, FOX & MEEHAN
By: /s/
Peter R. Sherman
Armin U. Kuder
Attorneys for Defendants Sheraton Corporation of America and Washington Sheraton Corporation

DISTRICT OF COLUMBIA, ss:

I certify that I have reviewed the foregoing Answers to Interrogatories and that they are true to the best of my present knowledge, information and belief and based on the knowledge of the supervisory personnel of the Sheraton-Carlton Hotel, counsel and the records presently available to us.

/s/ Henry de Rooze

Subscribed and sworn to before me this 18th day of December, 1970.

/s/ Patricia M. Donovan
Notary Public, D.C.

My Commission expires February 14, 1975.

EXHIBIT I

3(a)-(b) The following persons were Sheraton employees during February, March and April, 1963, and are still Sheraton employees. Each was asked the same question during the week of December 18, 1970 - See subparagraph 3(e):

Louis Anderson 824 - 12th Street, N.E. Washington, D.C.	Housekeeping
James A. Banks 746 Princeton Place, N.W. Washington, D.C.	Food Prep.
Roscoe Belk 1639 V Street, N.W. Washington, D.C.	Room Service
Jerry Bennett 5631 Sanger Avenue Alexandria, Va.	Room Service
Lawrence Bolton 903 S. Washington St. Alexandria, Va.	Unif. Serv.
Oscar Brown 7508 - 12th Street, N.W. Washington, D.C.	Food Prep.
Christopher Burazer 703 Tanley Road Silver Spring, Md.	Cock. Lounge
Mary F. Bush 623 - 5th Street Washington, D.C.	Housekeeping
Lula Byrd 1324 Monroe Street, N.W. Washington, D.C.	Food Prep.
Walter R. Chapman 5003 - 4th Street, N.W. Washington, D.C.	F & B. Gen.

John W. Chisholm 2585 Naylor Road, S.E. Washington, D.C.	F.O.
William Clem, Jr. 519 Woodston Road Rockville, Maryland	Unif. Serv.
Rosetta Clifton 2901 - 12th Street, N.E. Washington, D.C.	Food Prep.
Louise Collins 1509 - 16th Street, N.W. Washington, D.C.	Housekeeping
William B. Collins 3737 Legation St., N.W. Washington, D.C.	Bev. Prep.
Frank A. Dobrowski 2480 - 16th Street, N.W. Washington, D.C.	Banq.
Alvine Eglites 1631 S Street, N.W. Washington, D.C.	Housekeeping
James H. Ford 4206 - 4th Street, S.E. Washington, D.C.	Bev. Prep.
Lucy Frisnia 7 Towers Alexandria, Va.	Housekeeping
Freeman Glover 1909 - 9th Street, N.W. Washington, D.C.	Stew.
Mary Hall 1822 Calvert Street, N.W. Washington, D.C.	Housekeeping
Josephine Harrison 2802 Upshur Street Mt. Ranier, Maryland	Housekeeping

Claude Hicks 8804 Vernon View Drive Alexandria, Va.	Unif. Serv.
David S. Hill 1216 New York Ave., N.W. Washington, D.C.	Security
Frank B. Hoffman 2620 Spencer Road Chevy Chase, Maryland	F.O.
Joseph Hugya 5409 Newton Street Cheverly, Maryland	Room Service
James Jackson 1451 Parkwood Pl., N.W. Washington, D.C.	Stew.
Victor Hugo Jimenez 2812 Conn. Ave., N.W. Washington, D.C.	Waiter
Fred Kennedy 638 Lamont Street, N.W. Washington, D.C.	Stew.
Effie Kinard 3637 New Hamp. Ave., N.W. Washington, D.C.	Food Prep.
William A. King 1220 East-West Highway Silver Spring, Maryland	Cock. Lounge
Lizzie Mae Mason 1363 Childress St., N.E. Washington, D.C.	Stew.
Garrett McMillion 6329 Hillcrest Place Alexandria, Va.	Banq.
Cecelia Moder 4710 Georgia Avenue, N.W. Washington, D.C.	F & B.

Edith Murray 8712 Colesville Road Silver Spring, Md.	Fal. Room
George Musgrove 2300 Good Hope Road Washington, D.C.	Banq.
Rosbie Neal 1609 Otis Street, N.E. Washington, D.C.	Stew.
Conrad E. Nichols 708 - Easley Street Silver Spring, Maryland	Housekeeping
Gertrude Nichols 904 Massachusetts Ave., N.E. Washington, D.C.	Housekeeping
George A. Nixon 1110 - 6th Street, N.E. Washington, D.C.	Valet
Robert A. Peter 5941 - 6th Street Falls Church, Va.	Unif. Serv.
Sylvester Pointer 205 - 54th Street, N.E. Washington, D.C.	Stew.
Charles Prior 1301 - 15th Street, N.W. Washington, D.C.	A & G
Mae Reid 5207 Henderson Road, SE Washington, D.C.	Housekeeping
Gene Rowley 18 - 9th Street, N.E. Washington, D.C.	Housekeeping
Bessie W. Smith 4115 - 54th Place Bladensburg, Maryland	Unif. Serv.

William D. Thomas 9501 Old Georgetown Rd. Bethesda, Maryland	Housekeeping
Genell Tolbert 914 Kent Place, N.E. Washington, D.C.	Food Prep.
Benjamin W. Trexler 42 Maryland Avenue, S.E. Washington, D.C.	Unif. Serv.
John Turner 308 T Street, N.W. Washington, D.C.	Unif. Serv.
John H. Wade Box 537 Pindell Road Bristol, Maryland	R & M
Helen Warfel 2106 F Street, N.W. Washington, D.C.	Tele.
Oscar Weilenmann 4830 N. 22nd Road Arlington, Va.	Room Service
Joseph C. Wesley 2924 Southern Ave., S.E. Washington, D.C.	Unif. Service

The following persons were Sheraton employees during February, March and April, 1963, and are no longer Sheraton employees but had been contacted by counsel while still Sheraton employees. The corporate answer to interrogatory number one takes into account these conversations.

Laura Acock 2021 Woodreeve Road Avondale, Maryland	Telephone Operator
John D. Bowen 2119 - 31st Place, S.E. Washington, D. C.	Asst. Mgr.

Mary Lopez 2005 Oliver Street Hyattsville, Maryland	Housekeeper
Theodore Pully The Homestead Hot Springs, Virginia	Asst. Mgr.

The manager of the Sheraton-Carlton Hotel during the relevant period in 1963 was Mr. Edmund Reider who is now deceased.

EXHIBIT II

TO OUR EMPLOYEES:

In May, 1966, it was disclosed publicly in the news media that the FBI had engaged in electronic eavesdropping on Fred B. Black, Jr., during the months of February, March and April, 1963. Mr. Black occupied suite 438-440 in our Hotel during this period in 1963.

We are required by the United States District Court for the District of Columbia to ask each of you whether you authorized or assisted the FBI in the electronic eavesdropping on Mr. Black in February, March or April, 1963.

Prior to the 1966 public disclosure that the FBI was eavesdropping on Mr. Black's suite in our Hotel, did you have any knowledge that electronic eavesdropping of Mr. Black's suite was being conducted by the FBI?
Yes___ No___.

If your answer is yes, please summarize below what knowledge you had and state whether you authorized or assisted the FBI in such eavesdropping.

Sign Name:_____
Print Name:
Address: _____
_____
Date: December___, 1970

January 12, 1971

The Honorable Nathan J. Paulson, Clerk
United States Court of Appeals for the
District of Columbia
Constitution Ave. and John Marshall Place
Washington, D. C. 20001

Re: No. 23,542
Fred B. Black, Jr., v.
Sheraton Corporation of
America, et al. Petition
For Rehearing

Dear Mr. Paulson:

In connection with the above-referenced Petition for Rehearing, this is to advise the Court that on January 8, 1971, the petitioner took the deposition of Mr. Henry de Rooze, the agent of the Sheraton defendants who answered the plaintiff's interrogatories.

No further information was obtained from Mr. de Rooze concerning any involvement of the Sheraton defendants in the 1963 eavesdropping upon plaintiff's suite. However, Mr. de Rooze testified that in November 1968, the Sheraton defendants found the microphone in the wall of the suite which had been occupied by Mr. Black.

This testimony resolves the question of whether or when the F.B.I. removed the microphone from Mr. Black's suite. Accordingly, petitioner withdraws this question from the matters involved in the appeal.

Yours very truly,

Gerald S. Rourke

cc: Neil R. Peterson, Esq.
Peter R. Sherman, Esq.
Robert E. Anderson, Esq.
Judge John J. Sirica

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

NATHAN J. PAULSON
Clerk

Filed January 21, 1971

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1605

FRED B. BLACK, JR., PETITIONER

v.

SHERATON CORPORATION OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This suit was brought against the United States, the Sheraton Corporation of America, and the Washington Sheraton Corporation seeking damages for trespass and invasion of privacy allegedly resulting from eavesdropping upon petitioner at the Sheraton Carlton Hotel in Washington, D. C.

The sole issue before this Court is whether the court of appeals erred in dismissing, as improvidently granted, an interlocutory appeal from a decision of the district court holding that the United States, in

pretrial discovery, properly invoked the privilege protecting the identity of confidential informants as a ground for declining to give testimony or to produce documents relative to the identity of, the role played by, or the circumstances surrounding the use of confidential informers.[1]

1. As a part of his pretrial discovery, petitioner took the deposition of the FBI agent in charge of the criminal investigation of petitioner. The agent answered all questions except those which would have tended to identify a confidential informer who assisted the agent in his investigation of petitioner. Petitioner moved to compel answers to the questions and, later, for production of certain documents pertaining to the informer.

After an oral hearing on the motions, the district court ordered the United States to produce, for *in camera* inspection, all documents which identified the informer, pertained to his role, or summarized meetings or communications with him (Pet. App. A.25-A.26). Petitioner moved to modify the order to provide for an evidentiary hearing before the *in camera* inspection (Pet. App. A.26-A.27). This motion was denied. (Pet. App. A.27)

The court, upon examining the documents, ruled that the informer's privilege was applicable. Balancing the competing interests of the petitioner and the

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[1] The Solicitor General advised this Court, in May 1966, that eavesdropping had occurred in connection with a criminal trial of the petitioner. *Black* v. *United States*, 385 U.S. 26. The Court reversed petitioner's conviction and remanded for a new trial, at which he was acquitted (Pet. 5, n. 2).

United States in disclosure of the informer's identity under *Roviaro* v. *United States*, 353 U.S. 53, it concluded that the United States had properly invoked the privilege here (Pet. App. A.2-A.27).

2. The district court certified its decision on the informer's privilege issue (but not its decision regarding *in camera* inspection) for interlocutory appeal under 28 U.S.C. 1292(b) (Pet. App. A.28-A.29). The court of appeals initially accepted the appeal (Pet. App. A.29). After oral argument, however, the court dismissed the appeal as improvidently granted (Pet. App. A.1). At argument, the court questioned whether petitioner had exhausted his remedies in the district court because he had not sought the identity of the informer from the Sheraton defendants. Subsequent to the dismissal, petitioner filed interrogatories upon the Sheraton defendants seeking to ascertain the identity of the informer (Pet. App. A.31-A.34). The court of appeals extended petitioner's time to seek rehearing before it until 10 days after the interrogatories had been answered (Pet. App. A.29-A.30). After answers to the interrogatories had been filed by the Sheraton defendants,[2] disclaiming knowledge of the eavesdropping (Pet. App. A.34-A.41), petitioner moved for a rehearing. The motion was denied (Pet. App. A.43).

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[2] The district court denied the United States' motion to quash the interrogatories propounded to the Sheraton defendants, partially on the ground that the informer was immune from civil liability. The district court refused to certify this order for interlocutory appeal under 28 U.S.C. 1292(b), and the court of appeals denied the United States' Petition for Writ of Prohibition or Mandamus.

3. In the judgment which is before this Court, the court of appeals simply declined to exercise its discretion under 28 U.S.C. 1292(b) to entertain an appeal from an interlocutory order of the district court. The merits of the district court's decision which, in any event, rested largely on the particular facts of this case, may thus be reviewed by the court of appeals at a later time. The issues raised by petitioner do not, therefore, warrant review by this Court.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

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FRED B. BLACK, JR.,

Petitioner,

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SHERATON CORPORATION OF AMERICA, WASHINGTON SHERATON CORPORATION, and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A Memorandum in Opposition as short as that of the Solicitor General in this case, dealing not at all with the substantive issues raised in the petition, would ordinarily not warrant a reply. However, the Solicitor General states (Memorandum, p. 3) that the district court certified for interlocutory appeal its decision on the informer's privilege issue, but not its decision regarding *in camera* inspection, the implication being that the propriety of the *in camera* proceedings is not before the Court. To this the petitioner takes exception.

The basic thrust of petitioner's argument concerning the procedures in the court below is not that the district court erred in deciding to examine the Government's documents *in camera,* but in making its ultimate decision on the basis of the documents so viewed. Having examined the Government's documents *in camera,* the court could have, and petitioner maintains should have, excised from the pertinent documents the identity of any alleged informer, made those documents available to the petitioner, and ordered the Government to proceed with its showing on the record as to why such persons should be deemed informers, and why the privilege should apply.

While the petitioner saw no necessity for viewing extensive Government documents *in camera* in this case, the error raised on appeal is not the district court's decision to view the documents *in camera,* but the court's decision to base his ruling on the question before him on the information contained in those documents, without making them available to the petitioner for cross examination and rebuttal. Petitioner's contentions on this point were presented to the district court both in pleadings and oral argument, and the court's certification of his decision for interlocutory appeal certainly comprehended this issue.

Whether persons involved in electronic eavesdropping are informers, what procedures are to be followed by the district court on a claim of the informer's privilege in a case such as this, and whether parties who assist the Government in unlawful electronic eavesdropping are to be immune from civil liability are important questions, the resolution of which is necessary to the proper and orderly disposition of this case. The district court recognized that it would be costly, time consuming, and impractical for the court and the parties to conduct separate trials of these alleged joint tort-feasors. Accordingly, he certified his decision for interlocutory appeal.

The suggestion that the petitioner, a private citizen with limited resources, whose privacy was wrongfully invaded by

the Government and the hotel, should be compelled to go through two trials before his rights against the hotel are determined, merely because the Court of Appeals does not choose to face such questions at this time, should be rejected as contrary to an ordinary sense of fairness.

This is a proper case for interlocutory appeal, and the Court should grant review.

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GERALD S. ROURKE

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